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SOUTHERN DISTRICT OF CALIFORNIA
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

RICHARD GLEN MATHEWS,
Movant,
v.
UNITED STATES OF AMERICA,
Respondent.

Case No.: 3:16-cv-1356-BEN
3:91-cr-0663-BEN-2

**ORDER DENYING MOTION
[Doc. 1]**

Movant Richard Glen Mathews filed a Motion to Vacate, Set Aside, or Correct his Sentence pursuant to 28 U.S.C. § 2255. For the reasons discussed below, the motion is **DENIED.**

I. BACKGROUND

On the morning of May 15, 1991, James Wilson walked through the alley behind Ebony Street in Imperial Beach, California, picking up aluminum cans. *United States v. Mathews*, 36 F.3d 821, 822 (9th Cir. 1994). Wilson noticed a box near 120 Ebony Street, a residence rented by the president of the Mongols motorcycle gang's San Diego Chapter. *Id.* When Wilson picked up the box, a bomb within it detonated, blinding and deafening Wilson. *Id.* Wilson additionally suffered severe burns, lacerations, multiple fractures, and lost a finger. *Id.* He died seven months later. *Id.*

1 Movant Richard Glen Mathews and his co-conspirator, Michael Webb, were
2 responsible for creating and planting the bomb that destroyed Wilson's life and ultimately,
3 accelerated his death. *Id.* The bomb took three days to make and contained steel balls,
4 designed to cause severe injury to any person or property nearby. *Id.*

5 Following a jury trial in 1993, Movant was convicted of six felony counts: Count 1
6 – conspiracy to bomb property in and affecting interstate commerce, in violation of 18
7 U.S.C. §§ 371 and 844(i)(2); Count 2 – bombing property in and affecting interstate
8 commerce causing injury, in violation of 18 U.S.C. § 844(i), and aiding and abetting under
9 18 U.S.C. § 2; Count 3 – using and carrying a firearm¹ during a crime of violence, in
10 violation of 18 U.S.C. § 924(c)(1) and (c)(2); Count 5 – felon in possession of a firearm,
11 in violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1); Count 6 – unlawfully manufacturing
12 the bomb, in violation of 26 U.S.C. §§ 5861(f)(2), 5871, and aiding and abetting under 18
13 U.S.C. § 2; and Count 7 – unlawful possession of an unregistered firearm in violation of
14 26 U.S.C. §§ 5861(d), 5871, and aiding and abetting under 18 U.S.C. § 2.

15 Movant filed two direct appeals and was resentenced twice. At Movant's second
16 resentencing hearing on October 14, 1997, he was sentenced to a total of 495 months
17 imprisonment, consisting of:

- 18 • 60 months on Count 1;
- 19 • 135 months on Counts 2, 5-7, concurrently and concurrent to Count 1; and
- 20 • **360 months on Count 3, consecutively to all other counts.**²

21 As relevant here, Count 3 for using and carrying a firearm during a crime of violence, in
22 violation of 18 U.S.C. § 924(c)(1) and (c)(2), carried a mandatory minimum sentence of
23 30 years (360 months) to be served consecutively to the other sentences imposed.

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26 ¹ The "firearm" used in each of these counts was a bomb.

27 ² Movant was initially sentenced on April 12, 1993 but was resentenced twice—first
28 on July 31, 1995 and then on October 14, 1997. The sentence imposed on October 14,
1997 is the only sentence relevant here.

1 On February 17, 1998, the Court denied Movant's motion for a certificate of
2 appealability, finding probable cause did not exist for any appeal. Movant did not file the
3 instant § 2255 motion until June 2, 2016.

4 II. DISCUSSION

5 Movant argues his 30-year sentence and conviction for Count 3 for using a bomb in
6 the commission of a "crime of violence"—bombing under the federal arson statute, §
7 844(i)—must be vacated because his bombing conviction is *not* a "crime of violence," as
8 defined by § 924(c)(3). In opposition, the government raises two procedural challenges:
9 that Movant's motion is untimely under § 2255(f) and that Movant procedurally defaulted
10 on his claim by failing to raise it on direct appeal. The Court considers these procedural
11 arguments before turning to and rejecting the merits.

12 A. Movant's Motion is Timely

13 Since 1997, § 2255 has had a one-year statute of limitations. *See* 28 U.S.C. §
14 2255(f). The statute begins to run at the latest of four possible dates, including "the date
15 on which judgment of conviction becomes final" and "the date on which the right asserted
16 was initially recognized by the Supreme Court, if that right has been newly recognized by
17 the Supreme Court and made retroactively applicable to cases on collateral review." *Id.* at
18 § 2255(f)(1) and (3).

19 The government argues that Movant's motion is untimely because it was not filed
20 within one year of judgment; rather, it was filed nineteen years later within one year of the
21 Supreme Court's 2015 decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015).
22 Although the government concedes that *Johnson* represents a "new rule," it argues that
23 *Johnson* should not apply retroactively to an already-sentenced offender like Movant
24 because "it is neither a substantive nor a watershed rule of procedure." Doc. 133 at 12.

25 The government's argument is belied by the Supreme Court's decision in *Welch v.*
26 *United States*, 136 S. Ct. 1257, 1268 (2016). In *Welch*, the Supreme Court held that
27 *Johnson* was a substantive rule applying retroactively to cases on collateral review because
28 it "changed the substantive reach of the [ACCA], altering 'the range of conduct or the class

1 of persons that the [Act] punishes.” *Id.* at 1264-65. Thus, because Movant filed his §
2 2255 motion within one year of the June 26, 2015 *Johnson* decision, Movant’s motion is
3 timely under § 2255(f)(3).³

4 **B. Movant’s Motion is Not Procedurally Barred**

5 The government additionally argues that, regardless of whether his motion is timely,
6 Movant defaulted his *Johnson*-based claim by failing to appeal the Court’s jury instruction
7 that violation of § 844(i) was a “crime of violence” within the definition of § 924(c).
8 Indeed, “[t]he general rule in federal habeas cases is that a defendant who fails to raise a
9 claim on direct appeal is barred from raising it on collateral review.” *United States v.*
10 *Ratigan*, 351 F.3d 957, 962 (9th Cir. 2003). A movant may overcome such default where
11 (1) he demonstrates cause for the default and prejudice resulting from the violation of
12 federal law, or (2) where the movant is “actually innocent” of the offense. *Bousley v.*
13 *United States*, 523 U.S. 614, 622-23 (1998).

14 Here, contrary to the government’s position, the Court cannot say definitively that
15 Movant failed on direct appeal to challenge the Court’s jury instruction regarding his
16 “crime of violence” conviction. Because the relevant filings date back to the early 1990s,
17 well before the United States Courts began using digitally-imaged filings, the Court has
18 been unable to access the briefing relevant to Movant’s arguments on appeal. Still, the
19 record is clear that Movant did challenge on appeal the particular conviction at issue in this
20 motion, Count 3. *See United States v. Mathews*, 36 F.3d 821, 823 (9th Cir. 1994)
21 (“Mathews vigorously contends that sentencing on Counts 2 and 3 constitutes double
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23

24 ³ Furthermore, like *Johnson*, the Supreme Court’s 2019 decision in *United States v.*
25 *Davis*, 139 S. Ct. 2319 (2019) “changed the substantive reach of [§ 924(c)], altering ‘the
26 range of conduct or the class of persons the [statute] punishes.’” *Welch*, 136 S. Ct. at 1264-
27 65. For that reason, *Davis* is likely another ground for excusing Movant’s otherwise
28 untimely motion because *Davis* appears to have announced a retroactive substantive rule
applicable on collateral review, as conceded by the Solicitor General. *See* Brief for the
United States, United States v. Davis, Sup. Ct. No. 18-431 (Feb. 12, 2019).

1 jeopardy and double punishment for the same conduct.”). At minimum, then, the record
2 reveals that Movant raised on direct appeal whether Congress intended to punish both the
3 crime of bombing under § 844(i) and the crime of committing a “crime of violence”—the
4 bombing—with a bomb under § 924(c). *See id.* Thus, the Court cannot conclusively say
5 that Movant procedurally defaulted his claim. Regardless, the Court’s consideration of his
6 § 2255 motion reveals his claim lacks merit.

7 C. The Merits

8 Pursuant to Section 2255, Movant contends his conviction and sentence must be
9 vacated because they were imposed in violation of the Constitution or laws of the United
10 States. *See* 28 U.S.C. § 2255; *United States v. Quan*, 789 F.2d 711, 715 (9th Cir. 1986).
11 Specifically, Movant disputes his Count 3 conviction and sentence for 30 years to run
12 consecutively for his “use and carrying a firearm during a crime of violence” under 18
13 U.S.C. § 924(c).

14 As a preliminary matter, Movant argues that the record does not reflect which of
15 Movant’s convictions was used as the predicate “crime of violence” for his § 924(c)
16 sentence: conspiracy to violate § 844(i) or his actual violation of § 844(i). For that reason,
17 Movant contends, “The Court must assume that [his] § 924(c) conviction was based on the
18 conspiracy count.” Doc. 135 at 8. Movant is mistaken. In the Ninth Circuit’s opinion
19 following Movant’s first direct appeal, the Ninth Circuit identified the predicate crime used
20 for Movant’s Count 3 conviction, stating:

21 After a jury trial, Mathews was found guilty of Count 1, conspiracy with
22 Webb to bomb property in interstate commerce, in violation of 18 U.S.C. §§
23 371 and 844(i); of Count 2 of bombing property in interstate commerce in
24 violation of 18 U.S.C. § 844(i); of Count 3, using and carrying a firearm (the
bomb) **during and in relation to the crime of violence charged in Count 2**,
in violation of 18 U.S.C. §§ 924(c)(1) and (2) . . .

25
26 *Mathews*, 36 F.3d at 822-23 (emphasis added). It is clear then that Movant’s § 844(i)
27 conviction (Count 2), *not* his conspiracy conviction (Count 1), was the predicate “crime of
28 violence” for his Count 3 conviction. Therefore, whether Movant’s Count 3 conviction

1 and sentence are constitutional turns on whether violation of § 844(i) is or is not a “crime
2 of violence,” as defined in § 924(c).

3 The Ninth Circuit has already answered that question in the affirmative. In his first
4 direct appeal in 1994, Movant argued that his sentence on Counts 2 and 3 constituted
5 double jeopardy and double punishment for the same conduct. *Mathews*, 36 F.3d at 823.
6 In a published opinion, the Ninth Circuit disagreed, analyzing Congress’s intent with
7 respect to § 924(c). Specifically, the Ninth Circuit held:

8 Congress intended to punish both the crime of violence effected by the use of
9 the bomb under 18 U.S.C. § 844(i) and, cumulatively to add the punishment
10 for carrying the bomb in relation to this crime of violence.

11 *Id.* Thus, the Ninth Circuit has already resolved the issue Movant raises in his § 2255
12 motion. After analyzing Congress’s intent, the Ninth Circuit determined that Congress
13 intended “the use of the bomb under 18 U.S.C. § 844(i)” to be “*this* crime of violence” for
14 purposes of § 924(c). *See id* (emphasis added).

15 Movant’s arguments to the contrary are premised on the categorical approach set
16 forth in *Taylor v. United States*, 495 U.S. 575 (1990). However, because “the primary
17 purpose of the categorical approach is to effectuate the intent of Congress” and the Ninth
18 Circuit already determined Congress’s intent, the Court need not apply the categorical
19 approach. *See United States v. Rogers*, 389 F. Supp. 3d 774, 790 (C.D. Cal. 2019) (“A
20 long line of Supreme Court precedent consistently demonstrates that congressional intent
21 is the driving force behind the categorical approach”) (citing cases)); *see also United States*
22 *v. Simms*, 914 F.3d 229, 239-40 (4th Cir. 2019) (noting that the Supreme Court’s
23 development and application of the categorical approach “has always [been] rooted . . . in
24 the statutory language chosen by Congress”). The Court is bound by the Ninth Circuit’s
25 prior findings about Congressional intent, particularly those findings already applied to
26 Movant’s case. Thus, because the Ninth Circuit held that Congress intended bombing
27 under § 844(i) to be a “crime of violence” under § 924(c), Movant’s conviction and
28 sentence were properly imposed, and his motion must be denied.

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IT IS SO ORDERED.

DATED: September/7, 2019

HON. ROGER T. BENITEZ
United States District Court Judge